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No. 91-1504

In the Supreme Court of the United States

OCTOBER TERM, 1991

VINCENT DEGEROLAMO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a theft of cash can constitute a violation of 18 U.S.C. 659, which proscribes the theft of "goods or chattels" from interstate shipments.

2. Whether the district court properly departed upward from the sentencing range indicated by the Sentencing Guidelines, based on petitioners' refusal to return the $3.75 million that they stole.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 954 F.2d 79.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1992. The petition for a writ of certiorari was filed on March 18, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to commit theft from an interstate shipment and to commit mail and wire fraud, in violation of 18 U.S.C. 371; theft from an interstate shipment, in violation of 18 U.S.C. 659; mail fraud, in violation of 18 U.S.C. 1341; and wire fraud, in violation of 18 U.S.C. 1343. Petitioner Gerald De Gerolamo was sentenced to 97 months' imprisonment, petitioner Vincent DeGerolamo was sentenced to 78 months' imprisonment, and petitioner Bryser was sentenced to 120 months' imprisonment. Each petitioner also was sentenced to a three-year term of supervised release and a $10,000 fine, and each was ordered to pay restitution in the amount of $3,744,567.58. The court of appeals affirmed the convictions but vacated the sentences and remanded for resentencing. Pet. App. 1-25.

1. From July to November 1989, petitioners acquired two armored car companies for the purpose of stealing the funds customers entrusted to those firms. Petitioners induced customers to deal with them by obtaining large policies of theft insurance and by misrepresenting the identity, background, and experience of the armored car operators. To induce the insurance underwriters to issue the policies of insurance, petitioners made false statements about the operations of the armored car companies. On November 12, 1989, petitioners stole $3,744,567.58 in cash that had been stored over the weekend in one of the company vaults. The money has not been found. Pet. App. 3-7, 24.

2. The presentence reports for the three petitioners determined that the appropriate sentencing ranges

under the Sentencing Guidelines were 57 to 71 months for petitioner Bryser; 46 to 57 months for petitioner Vincent DeGerolamo; and 46 to 57 months for petitioner Gerald DeGerolamo. Each of the reports suggested that an upward departure might be appropriate based on petitioners' refusal to return the money. Bryser Presentence Report 22; G. DeGerolamo Presentence Report 20; V. DeGerolamo Presentence Report 20. The district court departed upward the equivalent of five levels, explaining that a rule under which

> defendants could exchange a predictable time in prison for money * * * would be an invitation to other people to commit crimes such as the one that these three defendants committed, to stash away the proceeds of the crime and then to have access to those proceeds once they leave prison.

Sent. Tr. 46.

3. The court of appeals affirmed petitioners' convictions, but vacated the sentences and remanded for resentencing. Pet. App. 1-25.

The court rejected petitioners' argument that the theft of the cash did not constitute a violation of 18 U.S.C. 659 because cash does not constitute "goods or chattels" within the meaning of the statute. Pet. App. 8-13. The court rejected petitioners' reliance on the express inclusion of the term "cash" in a provision added to the statute 20 years after the provision involved here was enacted, noting that "[t]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Id.* at 10. The court also noted that its interpretation conformed to "Congress' intention to protect the integrity of interstate commerce and to prevent interference with the flow of that commerce." *Id.* at 11. The court found

that exempting the theft of money from the reach of the statute would harm interstate commerce by discouraging the business of transporting cash, and concluded that "[s]uch disruptions of interstate commerce are precisely what Congress sought to avoid in enacting the statute." *Id.* at 12.

On the question of the validity of petitioners' sentences, the court of appeals remanded the case to the district court for further factual findings. Pet. App. 20-24. The court affirmed the district court's conclusion that a departure for failing to return stolen property is appropriate, noting that "the district court properly concluded that the Guidelines do not adequately consider situations such as this where defendants refuse to return stolen money because they are willing to exchange time in prison for instant riches upon release." *Id.* at 21. The court also rejected petitioners' claim that the upward departure violated their Fifth Amendment right against compulsory self-incrimination, finding that "[t]he act of producing the money would not be incriminating because it would not implicate [petitioners] in any crimes other than those for which they have been convicted." *Id.* at 22. Turning to the facts of this case, however, the court vacated the sentences based on the failure of the district court to make specific findings concerning whether petitioners still had control of the money. Accordingly, the court remanded for resentencing to allow petitioners to present evidence on that issue. *Id.* at 24. Petitioners have not yet been resentenced.[1]

ARGUMENT

1. Petitioners argue (Pet. 6-15) that the theft of the $3.75 million in cash bags did not violate 18 U.S.C.

[1] The district court granted petitioners' request for a stay of resentencing pending the disposition of the petition.

659, because cash does not constitute "goods or chattels" within the meaning of the statute.[2] The court of appeals properly rejected this claim.

Section 659 of Title 18 provides in pertinent part (emphasis added):

> Whoever * * * steals, or unlawfully takes * * * from any tank or storage facility, station, station house, platform or depot * * * with intent to convert to his own use *any goods or chattels* moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property [is guilty of a crime].

The language of the statute does not suggest that Congress chose the terms "goods" and "chattels" out of a desire to exclude money (or anything else) from the statute; rather, the language suggests that Congress wrote broadly intending to cover all objects of value that could be shipped in interstate commerce. The customary meaning of the language supports this construction. For example, *Black's Law Dictionary* offers definitions of both of the statutory terms that clearly include the bags of cash petitioners' companies agreed to transport. See *Black's Law Dictionary* 694 (6th ed. 1990) (defining "goods" as including "[a]ll things treated as movable for the purposes of a contract of storage or transportation"); *id.* at 236 (defining "chattel" as "[a]n article of personal property, as

[2] Petitioner Gerald DeGerolamo is not entitled to review of his claims, because he escaped from prison in March 1992 and has not been apprehended. This Court consistently has held that a defendant's status as a fugitive "disentitles [him] to call upon the resources of the Court for determination of his claims." *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970); see *Estelle* v. *Dorrough*, 420 U.S. 534, 537 (1975); *Bonahan* v. *Nebraska*, 125 U.S. 692, 692 (1887).

distinguished from real property. A thing personal and movable."). Similarly, the collocation of "goods" and "chattels" has a common use as "a general denomination of personal property, as distinguished from real property." *Id.* at 694.

The courts consistently have acknowledged the comprehensiveness of the statutory language. As the court stated in *United States* v. *Ingrao*, 844 F.2d 314, 317 (6th Cir. 1988), in rejecting a claim that foods stamps did not constitute "goods or chattels" within the meaning of Section 659, "[t]he very purpose of using a term like 'goods or chattels' which covers the full range of personal property is to *avoid* having to constantly amend the statute to specifically enumerate separate and distinct goods or chattels." The *Ingrao* court further observed that "[u]nder defendant's analysis, the items of most obvious value and, thus, most likely to be the target of theft from an interstate shipment would be removed from the purview of the statute." *Ibid.*; see also *United States* v. *Kalsbeck*, 625 F.2d 123 (6th Cir.) (applying statute to the theft of money from a Wells Fargo truck), cert. denied, 449 U.S. 904 (1980); *United States* v. *Waronek*, 582 F.2d 1158, 1161 (7th Cir. 1978) (rejecting claim that Section 659 requires proof of elements of common-law larceny). The breadth of the statutory language is underscored by the use of the term "any" to modify the terms "goods or chattels," which suggests that Congress meant those terms to be given a broad, rather than a restrictive, construction. Cf. *United States* v. *Turkette*, 452 U.S. 576, 580 (1981).

Petitioners' argument rests almost entirely (see Pet. 7-15) on the language of the fourth paragraph of Section 659, which specifically proscribes the theft of "money, baggage, goods, or chattels" from passengers

traveling on common carriers.[3] In petitioners' view, Congress's use of the fuller delineation in that paragraph precludes courts from including "money" in the "goods" and "chattels" covered by the first paragraph. As the court of appeals recognized (Pet. App. 9-10), however, that argument has little force in this case, because the provision referring to "money, baggage, goods, or chattels" was not enacted as part of the 1913 statute under which petitioners were convicted, but was added to that statute 20 years later, in 1933. Compare Act of Feb. 13, 1913, ch. 50, §§ 1-2, 37 Stat. 670 (original text), with Act of Jan. 21, 1933, ch. 16, 47 Stat. 773-774 (amendment adding fourth paragraph). Because "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980), the court of appeals correctly declined to accept petitioners' invitation to rely on subsequent legislative enactments to imply an exception to the inclusive language of Section 659.[4] Moreover, if petitioners' analytical frame-

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[3] The full text of the fourth paragraph of 18 U.S.C. 659 provides:

> Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen [is guilty of a crime].

[4] In any event, the surviving records offer no reason to believe that the 1933 statute inserting a new paragraph into what is now Section 659 was designed to alter the meaning of "goods" and "chattels" in the preexisting portions of the provision. Congress simply never considered the meaning or lan-

work is correct, the reference to "baggage" in the fourth paragraph requires the conclusion that "baggage" is not included in the "goods or chattels" covered by the first paragraph. That result attributes an extraordinarily odd scope to Congress's selection of the apparently all-inclusive phrase "any goods or chattels." It makes more sense to read the phrase "any goods or chattels" as it was written, to include all tangible movable property.

2. Petitioners also argue (Pet. 16-22) that the district court improperly departed upward from the sentencing range provided by the Sentencing Guidelines based on petitioners' refusal to return the $3.75 million that they stole; petitioners contend that such a departure violates the Sentencing Guidelines and also infringes their Fifth Amendment right against compulsory self-incrimination. Because the court of

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guage of the first paragraph in the course of drafting the new paragraph. See H.R. Rep. No. 1791, 72d Cong., 2d Sess. 1-2 (1932); 75 Cong. Rec. 13,821-13,823 (1932); 76 Cong. Rec. 710 (1932); *id.* at 1897-1899 (1933).

Petitioners err in arguing (Pet. 13 & n.7) that "Congress did consider the first paragraph of § 659 when the law was revised" in 1932. Petitioners state that "the legislative report shows that Congress not only expressly mentioned the first paragraph, but was preoccupied with theft of *articles* from railroad cars and the like." Pet. 13. In support of these assertions, petitioners cite S. Rep. No. 1632, 79th Cong., 2d Sess. 2 (1946). That report, however, was issued to explain amendments made to the statute in *1946*, some 14 years later. Moreover, the cited language sheds no light on the issue of whether the first paragraph of Section 659 covers money, but simply states that "[t]he present law applies only to a 'railroad car,' [and] makes it an offense to break the seal of such car or enter the same with intent therein to commit larceny," and explains that the pending amendments would expand the statute to cover other types of vessels and vehicles, and the breaking of "lock[s]" as well as seals. See *ibid.*

appeals vacated petitioners' sentences, this claim is not properly before the Court. See Pet. App. 25 ("we vacate the three [petitioners'] sentences and remand for resentencing"). If the district court determines that petitioners no longer have control over the $3.75 million in question, it will have to resentence petitioners within the sentencing range contemplated by the Guidelines; in that event, there will be no need for the Court to review the sentencing claim petitioners raise in the petition. If the district court finds that petitioners still have control over the money and reinstates its original sentence, petitioners will be able to seek review of that decision, first in the court of appeals and then in this Court. See Robert L. Stern, et al., *Supreme Court Practice* 226 (6th ed. 1986). Accordingly, review by this Court of petitioners' challenges to their sentences would be premature at this time.

In any event, petitioners' claims are meritless. First, a district court may impose a sentence outside the range established by the Sentencing Guidelines if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. 3553(b). Petitioners' flat refusal to disgorge the enormous proceeds of their theft constituted just such an aggravating factor. See *United States* v. *Valle*, 929 F.2d 629, 631-632 (11th Cir.) ("[T]he Guidelines do not contemplate a scenario such as this where the appellants expect to exploit the criminal justice system and enjoy the fruits of their crime following a relatively short period of incarceration"), cert. denied, 112 S. Ct. 401, 402 (1991).

Contrary to petitioners' contentions (Pet. 19-22), the restitution provisions of the Sentencing Guidelines do not address this affront to the law-enforcement process; they simply help to compensate victims. Similarly, the provision allowing a sentence reduction for acceptance of responsibility addresses nothing more than the commonplace notion that defendants who cooperate with the government and express remorse for their crimes should receive lighter sentences; it does not address the far different question of the propriety of an upward departure for defendants such as petitioners who are "[using] the jail cell [as] a way station on the road to ill-gotten gains," Pet. App. 24.

Nor is there merit in petitioners' claim (Pet. 16-19) that the departure violated their privilege against compulsory self-incrimination. As the court of appeals properly found (Pet. App. 22), the act of producing the money would not violate their rights against compelled self-incrimination because it would not implicate them in any crimes other than those for which they have been convicted. Contrary to petitioners' argument (Pet. 18), simple production of the money—which is all that the district court required—would not incriminate them on possible charges of perjury, money laundering, "structuring," obstruction of justice, or interstate transportation of stolen property, because the act of production would say nothing about where the money had been or what petitioners had done with it following the theft. It would implicate petitioners only in the theft itself, for which they already have been convicted. Hence, the district court's departure does not implicate the privilege. See generally *Doe* v. *United States*, 487 U.S. 201, 209-218 (1988).

There is no need to hold the petition pending the Court's decision in *Montana* v. *Imlay*, No. 91-687. The issue presented in that case is whether a convicted criminal defendant's privilege against compulsory self-incrimination is violated when his probation is revoked as a result of his refusal to accept responsibility for his crime. The defendant in *Imlay*, however, had testified in his defense at trial and denied any wrongdoing. Accordingly, requiring him to accept responsibility for his crime as a condition of probation would have forced him to incriminate himself on the crime of perjury. Here, by contrast, the court of appeals expressly found (Pet. App. 22) that the act of producing the stolen money would not implicate petitioners in further crimes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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